

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

DANNY ROMERO,

Plaintiff,

Civil No. 07-6083-HU

v.

O R D E R

JOHN VARGO, D.O., STEVE SHELTON,  
M.D.; DAVID GRAF, R.N.; TED  
RANDALL, R.N., JERRY BECKER, M.D.,

Defendants.

HAGGERTY, District Judge:

Magistrate Judge Hubel has issued a Findings and Recommendation [89] in this action. The Magistrate Judge recommended that defendants' Motion for Summary Judgment [55] should be denied as to defendant John Vargo, D.O., and granted as to all other defendants. It was also recommended that plaintiff's Motion for Appointment of Expert [64] should be granted.

Defendants object to the portion of the Findings and Recommendation that concluded that summary judgment should be denied as to defendant Vargo [90]. No other objections or responses were asserted by any party.

The portions of the Findings and Recommendation to which no objections were filed are now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept unchallenged recommendations of the Magistrate Judge. *Campbell v. United States District Court*, 501 F.2d 196 (9th Cir. 1974). No clear error appears on the face of the record. This court adopts the unchallenged portions of the Magistrate Judge's Findings and Recommendation.

However, when a party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate's report. 28 U.S.C. § 636(b)(1)(B); *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Defendants filed objections in a timely manner. The court has given the file of this case a de novo review, and has also carefully evaluated the Magistrate Judge's Findings and Recommendations, defendants' objections, and the record of the case. The Findings and Recommendation is adopted in its entirety.

### **ANALYSIS**

The facts of the case, and the legal standards that are applicable to the issues advanced, are presented thoroughly in the sound Findings and Recommendation, and need not be repeated in detail. Defendants object to the recommendation to deny summary judgment to Dr. John Vargo, arguing that "[t]he record contains no questions of fact that require a jury to decide whether Dr. Vargo was deliberately indifferent to Plaintiff's need for medical care for his foot." Objection at 1.

To the contrary, however, the Findings and Recommendation carefully established that there is a question of fact regarding whether the course of treatment undertaken on behalf of plaintiff was medically unacceptable under the circumstances, and whether defendant Vargo

maintained this course in conscious disregard of an excessive risk to plaintiff's health. It is true that conflicting medical opinions are insufficient by themselves to prove a "deliberate indifference" claim. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996). In their Objections, defendants reiterate this point – and repeatedly emphasize that expert testimony is almost always helpful or necessary in a "deliberate indifference to medical needs" case – but these arguments fail to compel sustaining defendants' objections. Despite defendants' unsurprisingly favorable opinions of their conduct, and plaintiff's inability to – as yet – produce an expert opinion that could refute those views, the Findings and Recommendation concluded correctly that an question of material fact exists regarding the extent of defendant Vargo's indifference toward plaintiff's medical condition. Defendants' primary objection to this conclusion – that a proper evaluation of the care plaintiff received requires expert analysis – is acknowledged and resolved by the Findings and Recommendation's further conclusion that the court should appoint an expert podiatrist to provide an objective analysis of the care plaintiff received. Accordingly, defendants' Objections are overruled.

### **CONCLUSION**

The Magistrate Judge's Findings and Recommendation [89] in this action is adopted. Defendants' Motion for Summary Judgment [55] is denied as to defendant John Vargo, D.O., and granted as to all other defendants. Plaintiff's Motion for Appointment of Expert [64] is granted.

IT IS SO ORDERED.

Dated this 8 day of September, 2009.

/s/ Ancer L. Haggerty  
Ancer L. Haggerty  
United States District Judge